Supreme Court, U.S.
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No. 03-485

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

vs.

HUMBERTO ALVAREZ-MACHAIN, et al.,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the federal law enforcement officers, and agents of the Drug Enforcement Administration in particular, have authority to enforce a federal criminal statute that applies to acts perpetrated against a United States official in a foreign country by arresting an indicted criminal suspect on probable cause in a foreign country.

2. Whether an individual arrested in a foreign country may bring an action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, for false arrest, notwithstanding the FTCA's exclusion of "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k), because the arrest was planned in the United States.

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OPINIONS BELOW

The opinion of the decision of the Court of Appeals sitting *en banc* (Pet. App. 1a-121a) is reported at 331 F. 3d 604. The panel decision of the court of appeals (Pet. App. 122a-156a) is reported at 266 F. 3d 1045. The district court's orders of March 18, 1999 (Pet. App. 157a-207a) and May 18, 1999 (Pet. App. 212a-247a), and its September 9, 1999, judgment (Pet. App. 212a-247a), as amended on September 23, 1999 (Pet. App. 248a-249a) are unreported.

JURISDICTION

This Court has jurisdiction based upon 28 U.S.C. § 1254(1).

STATEMENT

This case concerns the legal accountability of the United States under the Federal Tort Claims Act ("FTCA") for the unauthorized actions of low-level officials of the Drug Enforcement Agency ("DEA"). These officials planned and supervised the abduction of Dr. Humberto Alvarez-Machain from his medical office in Mexico in April 1990, and his surreptitious transportation from Mexico to the United States to stand trial for the murder of a drug enforcement agent in Mexico.

At trial Dr. Alvarez-Machain was acquitted of the underlying crime, and the United States now portrays his effort to obtain compensation for the misconduct of U.S. officials and their paid agents 14 years ago as both a threat to the war on terrorism and an attack on Executive authority. But those issues simply do not arise on these facts since the

abduction in this case was executed without the knowledge of either the President or the Attorney General and this case has nothing to do with acts of terrorism. This case concerns only a $25,000 damages judgment to remedy an unlawful abduction and reaffirm the rule of law.

Humberto Alvarez-Machain is a Mexican citizen and a doctor residing in Guadalajara. On April 2, 1990, he was abducted at gunpoint from his medical office by several Mexican nationals hired by the DEA to transport him to the United States. These men, including Francisco Sosa, the Petitioner in No. 03-339, were private bounty hunters acting in blatant violation of Mexican law. They had no warrant or any other legal authority to arrest or detain Dr. Alvarez at the time of his abduction.[1]

In January 1990, Dr. Alvarez was indicted by a grand jury for his alleged role in the April 1985 torture and murder of DEA agent Enrique Camarena in Mexico. It has never been alleged that Dr. Alvarez was engaged in any activity that posed any past or future threat to the national security of the United States. In 1990, he was being sought only for his alleged participation in this specific crime.

At no time was any formal request for extradition made to the Mexican government under the Mexico-United States extradition treaty.[2] Instead, the DEA agents in charge

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[1]There was a warrant issued for Respondent's arrest in Los Angeles, but this warrant was limited on its face to the territory of the United States. *See* Fed. R. Crim. P. 4(d)(2) ("*Territorial Limits*. The warrant [of arrest] may be executed or the summons may be served at any place within the jurisdiction of the United States").

[2]The Government claims to have had abortive informal discussions with Mexican officials about Dr. Alvarez; however, no formal request was made. Had the procedures of the United States-

of "Operation Leyenda" (the name of the operation to identify, prosecute and punish those responsible for agent Camarena's death) decided to bring Dr. Alvarez to the United States by extra-legal means. The zeal the DEA officers involved in this operation acted with to redress the murder of a fallen officer is understandable, but it cannot justify the circumvention of the limits on their lawful authority.

The authorization for this operation came from the Deputy Administrator of the DEA. There is no evidence in the record that any more senior government official approved it. Indeed, the DEA Administrator at the time, Jack Lawn, testified that he was unaware of the operation. *Alvarez-Machain,* 331 F. 3d at 642. Neither the President nor the Attorney General authorized this operation. *Id.*

After he was brought to Los Angeles, Dr. Alvarez sought dismissal of his prosecution on the grounds that the United States violated its extradition treaty with Mexico. Ultimately, this contention was rejected by this Court in *United States v. Alvarez-Machain*, 504 U.S. 669 (1992).

On remand, Dr. Alvarez was tried on the charges against him and on December 14, 1992, District Judge Edward Rafeedie granted his motion for acquittal finding that the government's case was based on "hunches" and "wild speculation" rather than legally sufficient evidence that Dr. Alvarez had participated in Agent Camarena's death.[3]

Mexico Extradition Treaty been followed , it seems unlikely that the United States could have presented adequate evidence of Dr. Alvarez' involvement in this crime to obtain his extradition.

[3]Judge Rafeedie was intimately familiar with the facts of the Camarena case, having presided over the convictions of several Camarena defendants. *See, e.g., United States. v. Lopez-Alvarez*, 970 F.2d 583, 586-587 (9th Cir. 1992) (convictions for violent crimes in aid

Dr. Alvarez initiated this lawsuit in July, 1993 after his return to Mexico. The facts concerning Dr. Alvarez' treatment during his abduction were hotly disputed at trial. Nevertheless, it is undisputed that Dr. Alvarez was abducted from his medical office on April 2, 1990, by Sosa and his associates, driven away in a private car while avoiding Mexican authorities, held in a motel overnight in a nearby town, prohibited from contacting his family, and prevented from leaving his captors at any time until they turned him over to waiting DEA agents in El Paso, Texas on April 3, 1990.

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of racketeering, conspiracy to kidnap and kidnapping a federal agent, felony murder and accessory after the fact affirmed); *United States. v. Felix-Gutierrez*, 940 F.2d 1200, 1202 (9th Cir. 1991) (ten year sentence for being an accessory after the fact affirmed); *United States. v. Vasquez-Velasco*, 15 F.3d 833, 838 (9th Cir. 1994) (two consecutive life terms for murders, related to and preceding the Camarena murder, of two tourists suspected of being DEA agents); *United States. v. Bernabe-Ramirez*, 1994 U.S. App. LEXIS 33719 (9th Cir. 1994) (convictions for kidnapping, being an accessory after the fact and committing violent crimes in aid of racketeering activity affirmed); *United States. v. Matta-Ballesteros*, 71 F.3d 754, 761-762 (9th Cir. 1995) (convictions for kidnapping a federal agent and conspiring to kidnap a federal agent affirmed); United States. v. Zuno-Arce, 339 F. 3d 886 (9th Cir. 2003)(conviction affirmed).

SUMMARY OF ARGUMENT

Dr. Alvarez' abduction and transportation to the United States violated U.S., Mexican, and international law.[4] The abduction fell outside the DEA's statutory arrest authority granted by Congress, and violated the Mansfield Amendment's explicit prohibition on DEA participation in extraterritorial arrests. 32 U.S.C. § 2291 (c)

The statutory and international law limitations on the DEA's authority to engage in extraterritorial arrests were clear and well-established at the time of the abduction. There can be no doubt that those officials who played a role in this operation knew that they were engaging in an extra-legal and unauthorized abduction.

The Government's claim that Congress has authorized the DEA to engage in extraterritorial arrests in violation of international law and notwithstanding the Mansfield Amendment is not supported by the language of 21 U.S.C. § 878. The United States implausibly argues that Congress *expressly* granted to the DEA extraterritorial arrest authority although the plain text of Section 878 is silent on where arrests may take place.

Section 878 must be construed in light of the subsequent Mansfield Amendment, which expressly bars U.S.

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[4]The Mexican Government immediately and formally protested the abduction and sought the extradition of the DEA agents involved in the operation. The governments of Mexico and Canada submitted *amicus* briefs to this Court stating that they considered the abduction to be a violation of established international law, *see* 31 I.L.M. 934 (1992)(Mexico) and 31 I.L.M. 919 (1992) (Canada), and the action has been condemned by the international community, just as the U.S. government would condemn the abduction of an American citizen from our territory.

law enforcement from participating in police actions in foreign countries related to narcotics control efforts. Section 878 must also be interpreted consistently with the long-established international norm against non-consensual law enforcement actions within the territory of another state.

The history of DEA activities in foreign countries and Congressional oversight thereof demonstrate that the DEA was only authorized to conduct its activities in cooperation with foreign governments in accordance with international law. Indeed, mutual cooperation between the United States and its allies, including Mexico, is the foundation of the DEA's foreign activities. There is no evidence whatsoever that Congress intended to authorize low- level DEA agents to undermine such cooperative efforts by abducting foreign nationals from their countries.[5]

Finally, these restrictions on the DEA's extraterritorial arrest authority are reinforced by the longstanding presumption against extraterritorial application of statutes, as the Court of Appeals held.

The United States incorrectly argues that federal DEA agents, who meticulously planned and supervised Dr. Alvarez' arrest from within the United States, should not be held accountable because of the FTCA's "foreign activities"

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[5] "At a speech in Los Angeles on April 23, 1990, shortly after this abduction, President Carlos Salinas de Gortari called for stricter respect for international law and an end to 'unilateral actions outside the law and infringing the rights of other nations'." Andreas F. Lowenfeld, *Kidnapping by Government Order: A Follow-up*, 84 Am. J. Int'l 712, 715 n. 10 (1990). "President [George H.W.] Bush, at his news conference on May 3, 1990, said 'yes, there were some misunderstandings here and I've told our key people to eliminate the misunderstandings. We don't need misunderstandings with Mexico...'"

exemption. In making this argument, the United States asks this Court to overturn the "headquarters doctrine" that has been *unanimously* upheld by the lower federal courts. The "headquarters doctrine" is fully consistent with the presumption against the extraterritoriality of statutes and recognizes that some torts may properly be traced to the conduct of federal officers acting within the territory of the United States.

The Government seeks to craft new law on issues not properly before the Court. The issue of whether federal law enforcement officials are authorized to engage in extraterritorial arrests or other activities in connection with the war on terrorism or in response to other national security threats is simply not raised by this case. Instead, the judgment below is supported by well-established jurisprudence providing for Congressional control of federal law enforcement activity and judicial review of those limitations. The actions of these DEA agents, in fact, undermined the Presidential control over foreign affairs and embroiled the United States in a needless dispute with its ally, Mexico. In short, it is the Government's view of Executive authority, not Dr. Alvarez' attempt to obtain compensation for his unlawful abduction, that poses a threat to the separation of powers.

The Court of Appeals' opinion does nothing to undermine the Executive's ability to protect our national security. Nor does the opinion address the question of the President s inherent authority to authorize the seizure of a foreign national suspected of a criminal offense outside the territorial boundaries of the United States for national security reasons. The opinion does not address the authority of other federal law enforcement entities or other agencies. No such directive was made in this case. The opinion defers to Congressional intent and acknowledges that Congress can

authorize the subordinate officers of the DEA to engage in extraterritorial arrests if it wishes to, even if such arrests violate international law, provided that Congressional intent is manifest.

The decision below enables Dr. Alvarez to recover a very modest amount of compensation from the United States for an abduction condemned around the world as a violation of domestic and international law. This result is in keeping with the remedial purposes of the FTCA and constitutes a modest accommodation to the rule of law in the face of claims of unrestrained Executive power. Such adherence to the rule of law will strengthen our national security, not undermine it.

ARGUMENT

I. THE DEA'S AUTHORIZATION STATUTE NEITHER EXPRESSLY NOR IMPLIEDLY AUTHORIZES EXTRATERRITORIAL ARRESTS.

The United States relies on a convoluted statutory construction argument premised on the erroneous assertion that 21 U.S.C. §878 (the DEA authorization statute) expressly authorizes DEA officers to engage in extraterritorial arrests. Section 878 simply does not say this. Moreover, the government's position flies in the face of explicit Congressional restrictions on extraterritorial arrests, and the presumption that federal statutes should not be read to allow violations of international law and the presumption against the extraterritorial effect of federal statutes.

Section 878 provides that:

> [a]ny officer or employee of the Drug Enforcement Administration or any State or local law enforcement officer designated by the Attorney General may. . . (3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony. . .

21 U.S.C. § 878(a). The statute does not explicitly authorize extraterritorial arrests.

In fact, the statute most directly on point, 22 U.S.C. §2291(c)(the Mansfield Amendment), expressly prohibits such extraterritorial arrests. (Prohibiting federal employees from "directly effect[ing] an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts.")

In addition to the Mansfield Amendment's explicit restrictions on extraterritorial arrests, the government's proposed interpretation of Section 878 also flies in the face of the fundamental principle that federal statutes should never be construed to authorize violations of international law if another construction is possible. In this case, the prohibitions on non-consensual extraterritorial arrests in international law are clear and have long been accepted by the United States. This fundamental tenet precludes the government's request that this Court read into Section 878 a blanket authorization to violate international law when any low-level federal officer believes it is necessary.

Finally, it is equally well-settled that when a statute is silent regarding extraterritorial application, that statute will be interpreted to apply only within the territory of the United States, as the *en banc* Court of Appeals held below.

In the final analysis, the Government's arguments are that this Court should re-evaluate the existing limitations on the DEA's authority in light of the events of September 11, 2001. However, this request makes no sense in the specific context of the 1990 abduction that gave rise to this case and should, in any event, be addressed to Congress.

A. Section 878 Does Not Authorize Arrests in the Territory of Foreign Countries Without the Consent of the Territorial State

The history of the DEA's drug enforcement and control activities in other countries is one of cooperation and securing the consent of foreign governments for those activities. The United States does not provide any history of Congressional knowledge and acquiescence in non-consensual DEA activities in foreign countries. The history cited by the United States is of *cooperative* narcotics enforcement in foreign countries. There is no evidence that Section 878 was intended to authorize non-consensual operations in other countries by DEA agents.[6] The Mansfield

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[6]The Government places inordinate reliance on statements by one legislator, Senator Specter, to support its view of the statute. *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980) (Statements of a single legislator who sponsored a bill are not controlling in analyzing legislative history). If Senator Specter's comments should be considered at all, this Court should note that Senator Specter believed that DEA agents' power to engage in law enforcement overseas *was* subject to the consent of the host country.

Amendment, the presumption against construing statutes to authorize international law violations and the presumption against extraterritorial application of statutes all confirm that Section 878 does not authorize the DEA to conduct extraterritorial seizures without the consent of the host country.

B. The Mansfield Amendment Expressly Prohibited Dr. Alvarez' Seizure.

Far from confirming the power of DEA officers to engage in extraterritorial arrests at its discretion, as the United States contends, the Mansfield Amendment circumscribes extraterritorial law enforcement activities, especially of the DEA, in this area. The Mansfield Amendment confirms that Congress has not granted the DEA the authority to make arrests in foreign countries without the host country's consent. That Amendment specifically prohibits all law enforcement agencies, including the DEA, from using paid agents to abduct Dr. Alvarez from Mexico to the United States.

Section 2291(c)(1) prohibits officers and employees of the United States from "directly effect[ing] an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts." The plain meaning is indisputable: the DEA did not have the authority to seize Dr. Alvarez in Mexico.

This plain meaning is also strongly reinforced by the Amendment's legislative history. The Senate Foreign Relations Committee Report stated that "[i]t is the Committee's intent that 'police action,' as used in this

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See 134 Cong. Rec. S. 16,036 (Daily Ed. Oct. 12, 1988) (statement of Sen. Specter).

provision is meant to prohibit U.S. narcotics agents abroad from engaging in actions involving the use of force and *actions involving the arrest of foreign nationals – whether unilaterally (acting on their own)* or as members of teams involving agents or officials of other foreign governments." *Internal Security Assistance & Arms Control Act*, S. 2662, 94th Cong., § 55 (2d Sess. 1976) (emphasis added) (hereinafter "*Mansfield Amendment Senate Report*").

Against these definitive statements in the legislative history, the United States offers only the supposition that "foreign police action" does not carry its clear meaning because the Amendment uses the term "foreign" twice. *Pet. Brf.* at 24 n. 3.[7] In contrast, the Justice Department's Office of Legal Counsel opined before the abduction in this case that the Mansfield Amendment applied to those circumstances where the DEA's conduct would likely result in the arrest of foreign nationals. 10 U.S. Op. Off. Legal Counsel 122 (1986). These limitations applied even where DEA officers,

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[7]A number of other statements in the legislative history confirm Congress' clear intent to bar unilateral law enforcement actions by the United States in foreign territory related to narcotics control efforts. *See* Report by Senator Mansfield, Winds of Change: Evolving Relations and Interests in Southeast Asia, S. Rep. No. 382-38, 94th Cong., 1st Sess. 9 at 9-10 (daily ed. Oct. 1975) (Police actions, including local drug enforcement, are functions of indigenous governments. If there is a U.S. role, it should be limited to the exchange of information and intelligence with appropriate Thai or other officials.); 121 CONG. REC. 38994 at 38994-95 (daily ed. Dec. 8, 1975) (Statement of Sen. Mansfield) (We cannot enlist the cooperation of others in the cause of protecting basic human rights and at the same time espouse a doctrine of law and order at any price. And. . . we cannot have it both ways-- and then refuse to accept any responsibility when things go sour.); 122 CONG. REC. 2592 (1976) (statement of Sen. Mansfield) ("[L]aw enforcement actions in foreign countries are -- and should remain -- the responsibility of local governments.").

like agent Camarena himself, were lawfully present in a foreign country.

The United States makes two implausible arguments as to why the Mansfield Amendment is inapplicable to this abduction: (1) the DEA was not "directly effect[ing]" Dr. Alvarez's arrest and (2) it was not part of any "foreign police action." *Pet. Brf.* at 23-24. Both of these arguments are premised on the fact that the DEA officers in this case hired bounty hunters to effectuate the seizure, rather than seize Dr. Alvarez themselves, or seize him with Mexican law enforcement authorities. This reasoning cannot be accepted as a justification for circumventing such clear Congressional intent.

First, the DEA was clearly "directly effecting" Respondent's arrest. The undisputed record evidence is that the DEA initiated and supervised the entire operation. The sole object of the operation was to seize Dr. Alvarez and bring him to the United States. The seizure would not have taken place had the DEA not conceived and executed the plan.

Second, with respect to "police action," Congress clearly intended this term to encompass unilateral actions by the United States as well as United States participation in foreign arrests. *See Mansfield Amendment Senate Report,* at 11-12. Moreover, even under the United States' definition of "foreign police action," *Pet. Brf.* at 24, the seizure of Dr. Alvarez qualifies as one. The United States hired former Mexican police officers, and the enterprise was a joint effort between the DEA and the Mexican nationals it hired to carry out a classic police function: the seizure of a person indicted for a criminal offense.

The United States seeks to deprive the Mansfield Amendment of its plain meaning through a convenient but

incorrect application of principles of statutory construction. These principles cannot negate this overwhelming evidence of Congressional intent.

First, the United States asserts that the Mansfield Amendment was "[e]nacted in 1976 in response to the DEA's then longstanding practice of participating in foreign law enforcement operations. . ." *Pet. Brf.* at 23. This participation, however, was with the cooperation of foreign governments and not without their consent. The Mansfield Amendment restricted even consensual law enforcement activities abroad out of concern for the sovereignty of other countries, as well as the safety of U.S. personnel.[8]

The case law interpreting the Mansfield Amendment confirms that Respondent's seizure violated the law. In *United States v. Bridgewater*, 175 F. Supp. 2d 141, 145-46 (D.P.R. 2001), the court applied the *Ker-Frisbie* doctrine to permit trial of a defendant seized by the DEA near St. Kitts. However, the court indicated that exigent circumstances were not present, and that, were the arrest effected within the

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[8]The DEA's manual clearly prohibits this kind of unilateral action without numerous approvals which were not obtained in this case. The manual reflects the limitations placed on the DEA's foreign activities by the Mansfield Amendment. Drug Enforcement Agency, *Agents Manual, 651* Guidelines for DEA Foreign Activities, §B1 " No Unilateral Activities. DEA representatives will not engage or participate in unilateral investigative operations or agreement developed between the United States and the host government unless these activities have the express and explicit approval of a responsible host government official, the Ambassador, the DEA Country Attache and the DEA Administrator."

territorial waters of St. Kitts (and thus in a foreign country), it would have violated the Amendment.[9]

In *United States v. Streifel*, 507 F. Supp. 480, 489 (S.D.N.Y. 1981), the court examined the legislative history of the Amendment and found it inapplicable to the seizure of a foreign vessel on the high seas. In so doing, though, the court quoted from the legislative history of the Amendment noting that the severe restrictions on the DEA's activities in foreign countries were not applicable in that specific context.

The United States contends that the Mansfield Amendment contains no enforcement mechanism, citing *United States v. Zabaneh*, 837 F.2d 1249 (5th Cir. 1988). *Pet. Brf.* at 24. This point has no bearing on this case. The Mansfield Amendment simply confirms the fact that Respondent's abduction was unauthorized and unlawful. Congress has separately provided a damages remedy against the United States under the FTCA for this tort.

The United States argues that the exceptions to the Mansfield Amendment for exigent circumstances, 22 U.S.C. § 2291(c)(3), and for U.S. officers assisting a foreign agent making an arrest with the approval of the chief of mission, 22 U.S.C. § 2291(c)(2), somehow prove that Congress authorized DEA officers to engage in this kind of extraterritorial seizure. These exceptions, patently

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[9] *United States v. Green*, 671 F.2d 46, 52 n. 9 (1st Cir. 1982), is also indicative of how the Government has misconstrued the Mansfield Amendment. The *Green* court found that the Amendment was inapplicable in that case because Great Britain had consented to the seizure, but recognized that it was intended to reduce friction between the United States and foreign nations. Of course, in this case, the seizure resulted in diplomatic protest by Mexico, exactly the sort of friction Congress sought to avoid.

inapplicable to the facts of this case, do not support this construction.

The exigent circumstances exception makes sense only if the DEA's activities in foreign countries are sharply restricted. If the DEA's arrest authority is extraterritorial, there is no need for this exception.

Similarly, if, as the Government contends, the prohibition on "directly effect[ing]" an arrest outlawed only DEA arrests while participating in a joint action with foreign police, there would be no need to specifically permit the DEA agent to be *present* at an arrest. This second exception *only* makes sense if DEA activities are *sharply* restricted overseas and a special exception is needed even to permit the DEA to be present.

Finally, the United States contends that the Mansfield Amendment's prohibition means that the DEA authorization statute *must* permit extraterritorial arrests, because otherwise, the Mansfield Amendment would be meaningless. *Pet. Brf.* at 24. However, its argument ignores that the Mansfield Amendment is not limited to the DEA. It prohibits *any* officer or employee of the United States, whether that person works for the DEA, the FBI, the CIA, the ICE, the Secret Service, the National Park Service, or any other agency (other than the military), from making an arrest if the other conditions of the statute are met. This is confirmed by the statute's language, "notwithstanding any other provision of law." 22 U.S.C. § 2291 (a) (4). It is entirely sensible that the Mansfield Amendment outlawed extraterritorial arrests by all non-military agencies. The Mansfield Amendment is not deprived of meaning whether or not the DEA had extraterritorial arrest authority prior to its passage. The Government's disingenuous attempt to avoid the clear restrictions in the Mansfield Amendment must fail. The

Court of Appeal's holding that the DEA lacked authorization is correct.[10]

C. Section 878 Must be Construed Consistently With International Law Restrictions on Non-consensual Extraterritorial Abductions

1. International Law Prohibits All Exercises Of The Police Power By One State In The Territory Of Another State Without The Latter's Consent.

There is no doubt that Congress was aware of the long standing international law prohibition on non-consensual extraterritorial law enforcement activity when it enacted section 878 and the Mansfield Amendment. The illegality of unilateral extraterritorial exercises of police powers by one nation in the territory of another cannot be seriously questioned.[11]

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[10] 10 U.S.C. § 374 (b)(1)(D), *Pet. Brf.* at 27, does not support the United States' claim that the Mansfield Amendment was inapplicable here. Section 374 (b)(1)(D) concerns *the military's* apprehension of *terrorists* in a foreign country. It has no relationship to the powers of subordinate DEA employees in a plainly criminal context.

[11] The Court of Appeals' decision that the norm prohibiting such abductions was not actionable under the ATCA does not affect the existence of universally accepted norms prohibiting the exercise of law enforcement authority in other countries. 331 F. 3d at 620. Although the *en banc* Court of Appeals, unlike the panel decision, *Alvarez-Machain*, 266 F. 3d 1045, 1050 (9th Cir. 2001), concluded that there was no international customary norm barring transborder abductions;

From the beginning of the Republic, this Court has recognized that international law prohibits one state from exercising its police power in the territory of another state in the absence of consent. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). Every nation has complete and exclusive sovereignty over its own territory. *Id.* No country may lawfully exercise police powers in the territory of another without consent. As emphasized by Justice Story in *The Apollon*, a case involving a U.S. seizure of a foreign vessel in a Spanish port:

> It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the law of nations.

22 U.S. (9 Wheat.) 362, 370-71 (1824). The non-consensual abduction of a national from his home country by the agents of another country clearly violates this norm.

The contemporary power of this ancient principle is recognized by the *Restatement (Third) of the Foreign Relations Law of the United States*, which summarizes the law in these terms: "[a] state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state." Restatement (Third) of Foreign Relations Law, § 432(2) (2003).

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this conclusion is incorrect for the reasons set forth herein.

The international authorities in support of this principle are numerous and consistent. The doctrine of territorial integrity is clearly protected by a range of international agreements.[12] Other more recent multilateral conventions specifically targeting drug offenses reaffirm this basic principle.[13] Customary international law is equally clear. According to the Permanent Court of International Justice, the "first and foremost restriction imposed by international law upon a State is that -- failing the existence of a permissive rule to the contrary -- it may not exercise its powers in any form in the territory of another State." S.S. Lotus (*Turkey v. France*), 1927, P.C.I.J. (ser. A) No. 10, at 18.

In the most famous abduction case in the modern age, the seizure of Adolph Eichmann by Israeli agents in Argentina, the U.N. Security Council adopted without opposition and with the affirmative vote of the United States, a resolution condemning the kidnaping and requesting "the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and rules of international law. . ." 112 U.N. Doc. S/4349 (1960). This acknowledged violation of international law was redressed only when Argentina and Israel mutually resolved to consider

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[12]*See, e.g.*, U.N. Charter, Art. 2, para 4 (June 26, 1945) 59 Stat. 1037, T.S. No. 993; Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2420, T.I.A.S. No. 2361, as amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, at art. 20.

[13]*See* 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Art. 2 (2) and (3) (entered into force for the United States November 11, 1990, *reprinted in* 28 I.L.M. 493 (1989)). [hereinafter 1998 Vienna Convention].

the incident closed. *In re Eichmann,* 5 Whiteman, Digest International law, §§ 208-14 (1961). The consistent disposition of other, less famous cases (*See* notes 14-16, *infra*) reaffirms that "[s]tates must not perform acts of sovereignty within the territory of another State." L. Oppenheim, International Law § 144b (H. Lauterpacht, 8th ed. 1995).

In addition to the more general authorities establishing this norm of customary law, the United States and Mexico specifically confirmed the norm in a bilateral agreement demonstrating their mutual acceptance of these limitations. In a 1990 treaty, the United States and Mexico agreed to cooperate in narcotics investigation and law enforcement. The treaty specifically provided that "[t]his Agreement does not empower one party's authorities to undertake, in the territorial jurisdiction of the other, the exercise and performance of the functions or authority exclusively entrusted to the authorities of that other Party by its national laws or regulations." *Agreement Between the United States of America and the United Mexican States On Cooperation in Combating Narcotics Trafficking and Drug Dependency*, July, 30, 1990, U.S.-Mexico, T.I.A.S. No. 11, 604.

Further, both state parties agreed that "[w]ithin the spirit of good neighborliness and cooperation governing the relations between the Parties, they agree to consult in advance with each other in the Commission, on actions that one of the Parties may intend to undertake, which may affect the other Party in a manner inconsistent with the object and purpose of this Agreement". *Id.* This treaty clearly reflects that the United States and Mexico fully recognize the norm of territorial sovereignty that prohibits non-consensual extraterritorial seizures in each other's territory.

The applicability of these standards here is readily apparent. As noted by Professor Louis Henkin, former U.S. member of the United Nations Human Rights Committee:

> [w]hen done without consent of the foreign government, abducting a person from a foreign country is a gross violation of international law and gross disrespect for a norm high in the opinion of mankind. It is a blatant violation of the territorial integrity of another state. . .

Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 J. Marshall L. Rev. 215, 231 (1992).

There are **no** cases upholding the lawfulness of an abduction like the one in this case. All of the cases involving extraterritorial arrests involve either an abduction in a territory that is not within the sovereign domain of a foreign nation, *e.g.*, the high seas;[14] or an abduction with which the territorial state cooperated or did not object;[15] or an abduction

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[14] *United States v. Younis*, 681 F. Supp. 909 (D.D.C. 1988); *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979).

[15] *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997) (Military operation specifically authorized by President and Secretary of Defense.); *Matta-Ballasteros v. Henman*, 896 F.2d. 255 (7th Cir.), cert. denied 498 U.S. 878 (1990); *United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Çir. 1988) (arrested by Mexican officials); *United States v. Toro*, 840 F.2d 1221 (5th Cir. 1988) (arrested by Panamanian officials); *United States v. Zabaneh*, 837 F.2d 1249 (5th Cir. 1988) (no protest by the Guatemalan government); *United States v. Rosenthal*, 793 F.2d 1214 (11th Cir. 1986) (arrested by Columbian officials); *United States v. Darby*, 744 F.2d 1508 (11th Cir. 1984) (arrested by Honduran officials); *United States v. Cordero*, 668 F.2d 32 (1st Cir.

undertaken without the direct participation of the United States government.[16] This case is unique precisely because transborder abductions like this one are universally condemned and avoided by governments.[17]

1981) (arrested and deported by Panamanian officials); *United States v. Reed*, 639 F.2d 896 (2d Cir. 1981) (no protest by Bahamian government); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975) (no protest by Bolivian government); *United States v. Herrera*, 504 F.2d 859 (5th Cir. 1974) (arrested by Peruvian officials); *United States v. Insull*, 8 F. Supp. 310 (N.D. Ill. 1934) (arrested by Turkish officials); *United States v. Unverzagt*, 299 F. 1015 (W.D. Wash. 1924), *aff'd sub nom., Unverzagt v. Benn*, 5 F.2d 492 (9th Cir. 1925) (no protest by Canada, where the abduction took place).

[16] *Ex parte Lopez*, 6 F. Supp. 342 (S.D. Tex. 1934); *United States v. Zabaneh, supra*; *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974) (U.S. agents not directly involved in abduction).

[17] The international authorities finding transborder abduction to be unlawful are similarly overwhelming. *See e.g., In re Vincenti*, (1920), in International Law, 1 Hackworth, Digest 624 (1940) (U.S. released a U.S. citizen seized in the British West Indies, after protest by Great Britain); *In re Jolis*, [1933-34] Ann. Dig. 191 (Tribunal Correctionnel d'Avesnes) (invalidating the arrest of a Belgian national by French police in Belgium on the ground that the Belgian government lodged an official protest with the French government). *Accord* Preuss, *Settlement of Jacob Kidnaping Case*, 30 Am. J. Int'l L. 123 (1936); *Casablanca Case (Fr. v. Germ.)*, Hague Ct. Rep. 110 (Scott ed. 1916) (holding, in regard to German deserters from the French Foreign Legion seized by the French in 1909, that it "was wrong for the French military authorities not to respect, as far as possible, the actual protection being granted to these deserters in the name of the German consulate"); *see also S. v. Ebrahim*, 1991 S. Afr. L. Rep. 1 (Apr.-June 1991) (barring the prosecution of a defendant abducted by agents of South Africa from another nation in violation of international law); *Bennett v. Horseferry Road Magistrates' Court*, 3 All E.R. 138 (House of Lords 1993) (transborder abductions are a violation of international law).

The Executive branch, in settings other than its litigation position in this case, has faithfully recognized that extraterritorial abductions by government agents violate international law. The former Legal Advisor to the Department of State testified before Congress that "[f]orcible abductions from a foreign state clearly violate this principle" of sovereignty and that "the United States has repeatedly associated itself with the view that unconsented arrests violate the principle of territorial integrity." FBI Authority to Seize Suspects Abroad, Hearing Before the Subcomm. Civil & Constitutional Rights of the House Jud. Comm., 101st Cong. 1st Sess. (1989) ("Oversight Hearings") (Sofaer statement).

Indeed, when the Soviet Union attempted to kidnap a Soviet citizen within the territory of the United States, the State Department, drawing on the customary understanding among states, declared that "the Government of the United States cannot permit the exercise within the United States of the police power of any foreign government." 19 Dep't of State Bull. 251 (1948).

Similarly, the Justice Department's Office of Legal Counsel, addressing a hypothetical strikingly similar to the Alvarez incident ten years before the fact, concluded that "it appears to be the case that a forcible abduction, when coupled with a protest by the asylum state, is a violation of international law." Extraterritorial Abduction by the Federal Bureau of Investigation, U.S. Op. Off. Legal Counsel. 5433 (1980). There is no evidence that the Department of Justice or any other Executive department has repudiated this conclusion as a matter of international law. *See* Oversight Hearings, *supra*, at 20-21 (Barr statement), 34-37 (Sofaer statement).

The Barr Opinion, 1989 O.L.C. Lexis 19, concluded that the President or the Attorney General has the authority

under U.S. domestic law to order the extraterritorial arrest of foreign criminal suspects, even though such an arrest would be in violation of principles of customary international law. The opinion, however, accepts the premise that state-sponsored abductions in foreign countries violate international law and concludes that nothing in U.S. constitutional or statutory law necessarily bars such abductions if ordered by the President. No such order was made here.

This Court's decision in *United States v. Alvarez-Machain* regarding the criminal prosecution against Dr. Alvarez, is not contrary. 504 U.S. 655 (1992). The only question presented was whether "a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts." *Id* at 657. This Court limited its decision to an interpretation of the bilateral Extradition Treaty between the United States and Mexico, finding that there was no violation. *Id.* at 669-70 ("Respondent and his *amici* may be correct that Respondent's abduction was shocking. . . and that *it may be in violation of general international law principles*. . . We conclude, however, that Respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico. . .") (citation and internal quotation omitted) (emphasis added). This Court did not hold that the Government's actions were, in all other respects, lawful, or rule that Dr. Alvarez had no remedy for his unlawful abduction.

Indeed, in *Ker v. Illinois*, after holding that the illegality of Ker's seizure posed no obstacle to criminal prosecution, this Court stated that "[t]he [kidnapped] party himself would probably not be without redress, for he could sue [the kidnapper] in an action of trespass and false

imprisonment, and the facts set out in the plea would without doubt sustain the action." 119 U.S. 436, 444 (1886). This is that action.

2. Section 878(a) Should Not Be Interpreted to Authorize Violations of International Law.

For two centuries, this Court has adhered faithfully to Chief Justice John Marshall's admonition that acts of Congress "ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); Restatement (Third), *supra*, § 114 ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.")

When Congress clearly manifests its intent to override international law and the statute cannot be reconciled with prior international obligations, the legislative will prevails. But, in the absence of such a clear statement of repudiation, the statutory interpretation that best conforms to this nation's international obligations under customary international law and treaties is controlling. *See, e.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995); *Weinberger v. Rossi*, 456 U.S. 25 (1982); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Lauritzen v. Larsen*, 345 U.S. 511, 578 (1953); *MacLeod v. United States*, 229 US 416, 434 (1913) ("The statute should be construed in the light of the purpose of the government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be

assumed that Congress proposed to violate the obligations of this country to other nations. . ."). In each of these cases, the Court's interpretation of international norms restricted the reach of domestic statutes couched in broad terms.

The *Charming Betsy* doctrine serves two critical functions which are relevant here. As Justice Scalia affirmed in his dissent in *Hartford Fire Insurance Co. v. California*, it first reduces friction with foreign sovereigns by assuring U.S. adherence to international law as far as possible. 509 U.S. 764, 815 (1993) (Scalia, J, dissenting) ("Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international law limits on jurisdiction to prescribe.")

In addition, the *Charming Betsy* doctrine serves the separation of powers, presumptively tilting every question of statutory interpretation away from the possibility of declaring the United States to be in breach of international law, and sparing the political branches embarrassment in the conduct of the nation's foreign affairs. *Chew Heong v. United States*, 112 U.S. 536, 540 (1884).

The federal courts have followed *The Charming Betsy* doctrine in a vast range of cases. On the strength of *The Charming Betsy*, courts have assumed that Congress, in enacting smuggling and drug statutes, intended to limit its exercise of the power to define and punish felonies committed on the high seas in conformity with the international law of jurisdiction.[18] Other decisions have made clear that, in the absence of Congressional intent to override international law,

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[18] *See, e.g., United States v. Robinson*, 843 F.2d 1 (1st Cir. 1988); *United States v. Marino-Garcia*, 679 F.2d 1373 (11th Cir. 1982), *cert. denied sub nom., Pauth-Arzusa v. United States*, 459 U.S. 1114 (1983).

the Executive's investigatory powers are limited by international norms governing jurisdiction to enforce.[19] Subject matter jurisdiction under various regulatory statutes, including the antitrust and securities laws,[20] and the criminal code,[21] have been held to be limited by international legal principles, subject always to Congressional expansion.

There is neither language nor legislative history in Section 878 that evinces any intent to authorize arrests and abductions in violation of the most basic principles of customary international law. Even when Congress uses broad language in the statute, its extraterritorial application may be blocked by international standards, *See Equal Employment Opportunity Commission v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (hereinafter "*Aramco*").

That principle applies *a fortiori* to this case, in which Section 878(a) does not refer to arrests in violation of international law, does not refer to the customary international authorities against such a practice, and certainly does not override them. Nor does the statute explicitly or implicitly override the Agreement between the United States of America and the United Mexican States on Cooperation in Combatting Narcotics Trafficking and Drug Dependency, signed 23

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[19] *See, e.g., Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984); *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980).

[20] *See, e.g., Pac. Seafarers, Inc. v. Pac. Far E. Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969); *United States v. Firestone Tire & Rubber Co.*, 518 F. Supp. 1021 (N.D. Ohio 1981); *Nat'l Maritime Union of Am. v. NLRB*, 267 F. Supp. 117 (S.D.N.Y 1967).

[21] *See, e.g., United States v. bin Laden*, 92 F. Supp. 2d 189, 213-14 (S.D.N.Y. 2000).

February 1989, entered into force 30 July 1990, T.I.A.S. No. 11,604.

This Agreement provides that, "this Agreement does not empower one Party's authorities to undertake, in the territorial jurisdiction of the other, the exercise and performance of the functions or authority exclusively entrusted to the authorities of the other Party by its national laws or regulations." *Id.*, at Art. I.

This bilateral agreement, signed and ratified before Dr. Alvarez' abduction, underscores the full adherence of the political branches of our government to the international law norms which preclude the Government's interpretation of the DEA's powers. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). "There is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action. 'A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.'" *Id.* at 252 (*quoting Cook v. United States*, 288 U.S. 102, 120 (1933)).

3. Even if the Executive Branch Has the Authority to Violate International Law, that Power May Not Be Exercised Without the Approval of the President.

As the five concurring judges in the Court of Appeals found, Congress certainly did not authorize low-level sub-cabinet officials to make the decision to engage in acts which violate international law. *Alvarez-Machain*, 331 F. 3d at 642 (Fisher J., concurring). ("It is evident . . . that neither Congress nor the Executive has expressed an intent to allow sub-cabinet-level law enforcement officials in the DEA to be

the final arbiters of [their] authority.") The evidence in this case is clear that the operation was authorized by Deputy DEA Administrator Peter Gruden and that DEA Administrator Jack Lawn did not even know of, much less authorize, the operation. *Id.*

Even the 1989 Barr Opinion made it clear that the asserted authority to violate international law depended on the involvement of the President or the Attorney General. Only then can the trade-offs between the pursuit of American interests abroad and the cost of violating international law be carefully considered.

There is simply no basis for believing that Congress intended to authorize low-level officials in the DEA, much less any DEA agent, as the Government argues, *Pet. Brf.* at 35, to make a decision to violate the sovereignty of a foreign ally. Certainly, at the very least this Court should expect the clearest statement from Congress, that it had that intent before issuing any decision conferring that extraordinary power on subordinate DEA officials.

D. The Court of Appeals Correctly Found Section 878(a) Should be Construed Consistent with the Long-Recognized Presumption Against the Extraterritorial Application of Statutes.

The Court of Appeals applied the presumption against extraterritorial application of statutes to hold that Congress had not expressly granted this authority to the DEA.

The presumption against extraterritorial application of the laws is well established. *Smith v. United States*, 507 U.S. 197, 204 (1993); *Aramco, supra*, 499 U.S. at 248; *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949). "It is a longstanding

principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Smith*, 507 U.S. at 204 (internal quotation omitted).[22]

Thus, in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), this Court applied the presumption against extraterritoriality to a statute prohibiting the Attorney General from returning refugees to a country where they might face persecution. The statute did not explicitly address whether it applied to aliens seized outside United States territory, and the Court held that the statute did *not* apply to Coast Guard seizures of Haitians on the high seas. In doing so, this Court decisively rejected the argument that the presumption against extraterritoriality only applies when certain limited policy rationales are served. 509 U.S. at 173-74.

The United States attempts to negate the presumption of extraterritoriality by arguing that Section 878(a) in fact confers extraterritorial arrest power upon the DEA. However, these arguments are not based on the express terms of the statute, but on canons of statutory construction. *Pet. Brf.* at 18. These methods of statutory interpretation do not create the sort of "express" statutory grant that is necessary to overcome the presumption against extraterritoriality. To find express intent, courts are to look solely at the *language of the statute*. *See e.g., Aramco*, 499 U.S. at 248.

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[22]The Government attempts to limit this presumption by implying that this doctrine serves limited policy rationales implicated by private lawsuits and thus has no application to legislation that does not touch on such areas. *Pet. Brf.* at 34. However, this Court has decisively rejected the United States' mode of analysis, saying that the presumption serves multiple policy goals and is not limited to certain specific types of legislation. *See, e.g., Smith*, 507 U.S. at 204 n 5.

The United States' main contention is that the presumption does not apply to criminal statutes. While it is true that the presumption does not apply to substantive criminal laws where such laws are not logically dependent upon a territorial limitation, *United States v. Bowman*, 260 U.S. 94, 98 (1922), the presumption applies in full force to the power of extraterritorial arrest, for several reasons.

First, the power to arrest extraterritorially implicates well-established norms of international law. These norms are not implicated when the United States regulates *conduct* abroad. Second, the power to seize a person poses far greater danger of offending other nations or causing an international incident than merely regulating conduct abroad. Arresting a person in the United States, or on the high seas, or through a consensual extradition, for overseas conduct simply does not raise the same issues implicated by Dr. Alvarez' abduction. Thus, there are compelling reasons why the "criminal law exception" to the presumption against extraterritoriality should not apply to enforcement activities.[23]

The United States contends that *Maul v. United States*, 274 U.S. 501 (1927), extends *Bowman* to enforcement powers. However, *Maul* never mentions the presumption against extraterritoriality. Moreover, it involved U.S. citizens and a U.S. boat. Also, *Maul* involved a statute that permitted the Coast Guard to seize boats "as well without as within their respective districts." The statute in *Maul* thus explicitly authorized extraterritorial seizures. The United States

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[23] *Bowman* says nothing about enforcement powers. *See id.* at 96-97 ("The sole objection [made by the defendants in *Bowman*] was that the crime was committed without the jurisdiction of the United States or of any state thereof and on the high seas or within the jurisdiction of Brazil.").

confuses the issue by discussing a later-passed statute, also discussed in the *Maul* opinion, permitting seizures by Coast Guard ships in their own districts as well as in the districts of other Coast Guard ships, but not outside territorial waters. This Court held in *Maul* that the later statute did not repeal the earlier statute that authorized extraterritorial seizures. *Maul* is also distinguishable in that it involved the *military* (*i.e.*, the Coast Guard), and thus implicated the Commander-in-Chief power in a manner not implicated in this case.[24]

The lower-courts have correctly concluded that *Bowman* applies to the extraterritorial application of criminal statutes regulating primary conduct. Thus, in *United States v. Plummer*, 221 F.3d 1298, 1304 (9th Cir. 2000), the Court compiled cases that applied *Bowman* and found that all of them involved the extraterritorial application of substantive criminal law, not enforcement power.[25]

The *Bowman* rule has been invoked on the issue of the substantive reach of a criminal statute (which *Bowman* governs) in cases where the enforcement power was also at issue. However, the courts uniformly relied on authorities

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[24] Just eight years after *Maul*, Congress rejected this Court's construction of the Coast Guard statute and passed a new statutory scheme that limited the authority of the Coast Guard to seize vessels on the high seas. *See United States v. Gonzalez*, 875 F.2d 875, 879 (D.C. Cir. 1989). *Maul* has rarely been cited since, and it is not clear that it is good law even on the precise point decided.

[25] In *The Rosalie M.*, 4 F.2d 815, 816 (S.D. Tex. 1925), *aff'd on other grds.*, 12 F.2d 970 (5th Cir. 1926), the District Court did cite *Bowman* as justification for a seizure of a foreign-flagged boat in international waters. However, the Court of Appeals affirmed on a different ground, assuming the illegality of the seizure but holding that it did not deprive the courts of jurisdiction over the vessel.

other than *Bowman* to find that the government agency at issue had enforcement power.[26]

The United States also argues that it is implausible that Congress intended to criminalize extraterritorial conduct without granting the DEA the power to arrest violators of those laws. *Pet. Brf.* at 19. This is a *non sequitur*. It assumes that non-consensual extraterritorial abductions are the only means of apprehending suspects. In fact, there is a broad array of bilateral and multilateral methods to lawfully apprehend criminal suspects, including extradition treaties.

Moreover, there are other law enforcement agencies, such as the Coast Guard, which have express extraterritorial seizure authority and which can enforce such laws. There are formal (e.g. extradition treaties) and informal diplomatic

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[26] *See United States v. Yunis*, 924 F.2d 1086, 1092-94 (D.C. Cir. 1991) (Navy has statutory and regulatory authority to assist in arrest in international waters); *United States v. Walczak*, 783 F.2d 852, 856-57 (9th Cir. 1986) (upholding a search by United States Customs agents conducted at a Canadian airport pursuant to an international agreement between the United States and Canada); *United States v. Postal*, 589 F.2d 862, 872 n. 15 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979) (Coast Guard has *statutory* authority to board vessels); *United States v. Streifel*, 507 F. Supp. 480, 483-84 (S.D.N.Y.), *aff'd* 665 F.2d 414 (2d Cir. 1981) (same); *United States v. Cedena*, 585 F.2d 1252, 1257-58 (5th Cir. 1978), *overruled on other grounds*; *United States v. Michelena-Orovio*, 719 F.2d 738, 757 (5th Cir. 1983), *cert. denied*, 465 U.S. 1104 (1984) (same); *United States v. Keller*, 451 F. Supp. 631, 637 (D.P.R. 1978) (same); *cf. United States v. Noriega*, 746 F. Supp. 1506, 1539-40 (S.D. Fla. 1990), *aff'd*, 117 F.3d 1206 (11thCir. 1997), *cert. denied*, 523 U.S. 1060 (1998) (citing *Bowman* on substantive reach of statute, but ruling legality of military invasion of Panama to capture defendant was unreviewable political question). If *Bowman* were applicable to enforcement powers, there would have been no need for these courts to look to other legal authorities for authorization of the challenged enforcement activities.

means of obtaining the rendition of criminal suspects. That Congress would choose not to authorize a particular law enforcement agency to make extraterritorial arrests is in no way inconsistent with the extraterritorial reach of some of our criminal laws. For this reason, Judge O'Scannlain was incorrect in concluding in his dissent below that merely because Congress had passed extraterritorial narcotics laws the DEA must *ipso facto* have the power to violate other nations' sovereignty. *See* Pet. Brf. at 11,20-21.[27]

The United States argues that the presumption against extraterritoriality should not be read to limit executive power over foreign affairs. However, nothing in the Court of Appeals' opinion does so. The presumption against extraterritoriality is invoked in determining what powers *Congress* intended to grant to the DEA.[28]

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[27]The United States turns the law on its head by arguing that because the Court of Appeals correctly recognized that the actions of the United States military pursuant to the war power might be beyond the reach of this sort of action, the DEA must also have that power. *Pet. Brf.* at 38. It is well established that the judiciary's power to adjudicate war powers issues is sharply limited. However, the DEA is not the military, and adjudications concerning the scope of DEA authority simply do not raise the same concerns.

[28]The Government's cases do not undermine the application of this presumption here. *Department of the Navy v. Egan*, 484 U.S. 518, 529-30 (1988), is distinguishable. In *Egan*, the Court held that security clearances, which were expressly authorized by Congress, were not subject to administrative review where Congress had not provided for a review procedure. Unlike the area of security clearances, in which the Executive has almost plenary executive discretion, Congress has traditionally and properly set the bounds of executive power to effectuate arrests. *Haig v. Agee*, 453 U.S. 280, 293-94 (1981), held that the executive branch had the power to revoke the passport of an ex-CIA operative who was releasing classified information to the public. *Haig*

The Government's suggestion that the Court of Appeals opinion leaves the United States with no choice but the use of military force is specious and at odds with the sophisticated use of international law that presents many alternatives to unilateral military action.[29]

II. The Foreign Country Exception of the FTCA Has Never Applied to Tortious Conduct Initiated By

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noted that Congress had long delegated to the Executive Branch the authority to determine the conditions under which passports are issued. No analogous delegation occurred here. *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1946), involves the *scope*, not the existence, of judicial review where the denial of a license to operate a commercial flight was based on national security grounds by the President. This case does not require the courts to review the determination of the President of what is necessary for national security; rather, this case concerns whether lower executive branch officials exceeded delegated powers.

[29] Citing *Kasi v Angelone*, 300 F. 3d 487 (4th Cir), *cert. denied*, 537 U.S. 1025 (2002), the government claims that limiting the DEA's authority to engage in extraterritorial arrests will hamper its efforts in the war on terrorism. *Pet. Brf.* 31-32. But *Kasi* case offers a textbook example of lawful cooperative enforcement efforts between the United States and another country in a terrorism case: unlike Mexico in this case, Pakistan did not and to this day does not object to the Kasi abduction. According to the case report, "the record is silent as to what extent foreign nationals were involved in Kasi's capture, initial imprisonment, and return to the United States" not because that evidence does not exist but because of "security concerns."*Id.*, at 496. Moreover, the district judge in *Kasi* was able to handle sensitive issues relating to the circumstances of Kasi's arrest and interrogation through *in camera* hearings and other special procedures. *Id.*, at 496 n3 and 507 *et seq*. The district judge in this case was similarly able to handle discovery issues without difficulty or inappropriate disclosure.

United States Officials in This Country With Extraterritorial Effect.

Based on this Court's decision in *Richards v. United States*, 369 U.S. 1 (1962), the lower courts uniformly have held that an FTCA suit does not arise in a foreign country and is thus not barred where it alleges that conduct *within the United States* caused harmful extraterritorial effect.[30]

The "headquarters doctrine" originated in *Richards, supra*. The issue in *Richards* was an FTCA choice of law issue based on whether the "act or omission occurred" in Oklahoma (where the negligent act took place) or Missouri (where the injury was suffered). This Court held that the act or omission occurs where the tortious act took place, and therefore applied Oklahoma law.

The United States attempts to distinguish *Richards* by arguing that the result should be different when the foreign country exception is in play. This contention has no merit. As the United States admits, the foreign country exception's purpose was to prevent the United States from being subjected to the tort law of foreign jurisdictions. *Pet. Brf.* at 46. What the headquarters doctrine does, however, is subject the United States to liability *under the state tort law of one of the fifty states* for torts committed in that state that have extraterritorial effect. In other words, just as in *Richards*, the effect of a headquarters claim is simply to apply the local law

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[30] It is misleading to label the headquarters doctrine as "judicially created" as the United States does. *Pet Brf* at 17, 45. The FTCA does not define what claims "arising" in a foreign country means. The judiciary did not graft an exception onto the statute but merely construed the word "arising," holding that claims based on conduct *in the United States* do not arise in foreign countries, even if they cause extraterritorial effect.

of the *American* jurisdiction where a tortious act took place in determining whether the act was tortious. There is no logical reason why a different rule would apply simply because the *effect* of the tort is felt outside the country.

Indeed, every federal court that has decided the issue has recognized the validity of the headquarters doctrine. *Nurse v. United States*, 226 F.3d 996, 1003 (9th Cir. 2000); *Couzado v. United States*, 105 F.3d 1389, 1395-96 (11th Cir. 1997); *Cominotto v. United States*, 802 F.2d 1127, 1130 (9th Cir. 1986); *Newborn v. United States*, 238 F. Supp. 2d 145, 148-49 (D.D.C. 2002), *aff'd*, 2003 WL 23120144 (D.C. Cir. Dec. 2002); *Macharia v. United States*, 238 F. Supp. 2d 13, 22 n 3 (D.D.C. 2002); *Kielczynski v. United States*, 128 F. Supp. 2d 151, 157-58 (E.D.N.Y. 2001); *Romero v. Consulate of the United States*, 860 F. Supp. 319, 325 n 14 (E.D.Va. 1994); *MacCaskill v. United States*, 834 F. Supp. 14, 17 (D.D.C. 1993); *Donahue v. United States Dept. of Justice*, 751 F. Supp. 45, 48 (S.D.N.Y. 1990); *cf. Eaglin v. United States*, 794 F.2d 981, 983 (5th Cir. 1986) (declining to decide whether headquarters doctrine exists); *Beattie v. United States*, 756 F.2d 91, 97-98 (D.C. Cir. 1984) (assuming *arguendo* that the doctrine exists).[31]

The United States nonetheless asks that this Court overturn these cases because the headquarters doctrine contravenes the purpose of the foreign country exception. There is no doubt that the foreign country exception is

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[31] *Eyskens v. United States*, 140 F. Supp. 2d 553, 561 (E.D.N.C. 2000), construed the headquarters doctrine most narrowly, limiting it to cases where the act that was the most proximate cause of the injury took place in the United States. However, even under *Eyskens*, Respondent has a valid headquarters claim, as the act that caused his injury, *i.e.*, his abduction, was ordered and controlled by federal officers in the United States.

designed to preclude the United States from being subjected to foreign tort rules. However, the United States was not subjected to such rules in this case; the Court of Appeals applied California law, not Mexican law. The United States argues that it does not make sense for California law to apply to the seizure of a Mexican citizen inside Mexico. It makes no more sense for any other body of law to apply to the decision of United States governmental officials based in California to arrest a suspect in a criminal case pending in Los Angeles.

The United States argues that even if the headquarters doctrine exists, in intentional tort cases the tort generally occurs where the wrongful act occurred. *Pet Brf.* at 45. This argument should be rejected. First, it ignores the District Court's finding that the United States planned and ordered the execution of this operation in the United States.[32] Second, were this argument recognized, the United States would face liability for negligently causing a harm from the United States, (because this would be covered by the headquarters doctrine), but where the United States *ordered* the harm to occur, the United States would be immune. There is no basis in the FTCA to countenance such an anomalous result.

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[32]This is very distinct from a case such as *Landry v. A-Able Bonding, Inc.*, 75 F.3d 200, 205 n 7 (5th Cir. 1996), where an arrest was made in Texas based on a Louisana warrant. The warrant in *Landry* was not an order to arrest; it was permission to arrest. *Id.* at 204-05. This operation was *directed* by DEA officials in California.

III. THE COURT OF APPEALS PROPERLY REJECTED THE DISTRICT COURT'S HOLDING THAT THIS UNLAWFUL ARREST COULD BE TRANSFORMED INTO A VALID "CITIZEN'S" ARREST.

The FTCA does not require, as the United States implies, that federal officers are always permitted to do everything a private citizen may do. Rather, the United States is liable "to the same extent as a private individual under like circumstances." The Courts of Appeal have held that FTCA false arrest claims are subject to a host of more specific rules as compared to citizen's arrests and thus a federal law enforcement agent does not act "under like circumstances" to a private citizen. *Hetzel v. United States*, 43 F.3d 1500, 1503 n. 4 (D.C. Cir. 1995); *Caban v. United States*, 728 F.2d 68, 73-74 (2d Cir. 1984); *Ting v. United States*, 927 F.2d 1504, 1514 (9th Cir. 1991); *Arnsberg v. United States*, 757 F.2d 971, 978-79 (9th Cir. 1984). These holdings are based on this Court's discussion of the FTCA in *Feres v. United States*, 340 U.S. 135, 142 (1950) ("[T]he liability assumed by the Government. . . is that created by 'all the circumstances,' not that which a few of the circumstances might create.") (citing 28 U.S.C. § 2674).

The United States ignores the case law, which is directly on point, and holds that citizen's arrest laws do not affect liability under the FTCA because they do not meet the "like circumstances" requirement, and relies on inapplicable case law from other areas of law. *United States v. Sealed Juvenile I*, 255 F.3d 213, 217-18 (5th Cir. 2001), was a Fourth Amendment challenge to a seizure, which was justified based on a Texas statutory scheme that expressly made customs officers subject to the rules that apply to private citizen's

arrests. This case is distinguishable both because in the Fourth Amendment context, there is no "like circumstances" requirement and also because the Texas scheme differs markedly from California's false arrest laws. *United States v. Layne*, 6 F.3d 396, 398-99 (6th Cir. 1993), *cert. denied*, 511 U.S. 1006 (1994), and *Ward v. United States*, 316 F.2d 113, 117 (9th Cir.), *cert. denied*, 375 U.S. 862 (1963), are also Fourth Amendment, not FTCA cases.

There is simply no analogy between an ordinary citizen's arrest and the rules that govern agents of the government; thus, the "like circumstances" requirement is not met. Additionally, state legislatures (including California's legislature) write specific statutory schemes that govern what can and cannot be done when executing an arrest warrant (or purportedly executing an arrest warrant). The Ninth Circuit's conclusion that California's citizen's arrest framework does not authorize the conduct here is a pure question of state law that should not be reviewed by this Court. *United States v. Varig Airlines*, 467 U.S. 797, 816 n 12 (1984). The application of citizen's arrest provisions to these schemes would simply make the rules that govern arrests less clear and more indeterminate.

Permitting law enforcement to use "citizen's arrests" to escape restrictions on their authority may also violate the Fourth Amendment. The Fourth Amendment applies to state actors and imposes probable cause and reasonableness requirements on their seizures to which citizens making citizen's arrests are not subject. Thus, a city policy that attempted to substitute "citizen's arrests" for formal arrests by the police was declared unconstitutional in *Corcoran v. Fletcher*, 160 F. Supp. 2d 1085, 1091-92 (C.D.Cal. 2001). It is conceivable that a police officer or a federal law enforcement agent *can* make a citizen's arrest in a situation

where he or she is in "like circumstances" to a private citizen. For instance, an off-duty officer who happens upon the commission of a felony in progress is entitled to make a citizen's arrest just like an ordinary citizen may. *Monteiro v. Howard*, 334 F. Supp. 411 (D.R.I. 1971). However, the distinction is between the officer who happens upon a crime while outside his or her jurisdiction, and a planned law enforcement operation by agents who have no authority to effect the seizure. The latter are *not* in "like circumstances" to an ordinary citizen making an arrest. *Id.* at 415 (distinguishing situation where peace officer goes outside of jurisdiction with purpose of making arrest).

IV. ALLOWING RECOVERY UNDER THE FEDERAL TORT CLAIMS ACT DOES NOT VIOLATE SEPARATION OF POWERS OR RAISE A POLITICAL QUESTION.

This Court has emphasized that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v Carr*, 369 U.S. 186, 211 (1961). The United States asserts a broad principle that would preclude any judicial review of actions by any executive official, at any level, if it occurs in a foreign country, no matter how serious the injury imposed or how illegal the conduct. This Court's decisions provide no support for such unlimited executive immunity from judicial review. To the contrary, this Court has frequently considered the legality of executive actions even in the realm of foreign policy when they allegedly infringe upon the rights of individuals. Indeed, it is the Government's position, precluding all judicial review of executive action touching foreign policy, that would raise grave separation of powers

concerns, especially when it would preclude judicial enforcement of federal statutes.

Petitioners' claim that judicial review is foreclosed because of separation of powers concerns and the political question doctrine is refuted by no less than *Marbury v. Madison*, 5 U.S. (1 Cranch) 103, 163 (1803) ("[T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). This Court in *Marbury* affirmed that the judiciary can provide remedies against the executive when there is a specific duty, created by law, to a particular person. *Id.*

This Court has frequently engaged in judicial review of executive actions, even those touching on foreign policy concerns, when the rights of individuals are involved. For example, this Court has reviewed on the merits the constitutionality of the President's use of executive agreements which allegedly violate property rights. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981).

This Court's decision in *Japan Whaling Ass'n v. American Cetacea Society*, 478 U.S. 221 (1986), is exactly on point in upholding the necessity for judicial review, even if foreign policy is implicated, when a federal statute creates rights of individuals. Federal statutes required the Secretary of Commerce to certify whether Japan's whaling practices violated the International Convention for the Regulation of Whaling by harvesting more whales than the Convention allowed. Environmental groups sued and the argument was made that judicial review was precluded because the matter concerned foreign policy. This Court emphatically rejected that claim and explained that "courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a

recurring and accepted task for the federal courts." *Id.* at 230. This, of course, is exactly the situation presented by this case: Respondent is suing under federal statutes to remedy a violation of his individual rights. He is not bringing a general challenge to "policy choices" of the President. *Id.*

The cases invoked by Petitioners do not support judicial abstention in this damage action. Petitioner Sosa repeatedly cites to this Court's decision in *Banco Nacional de Cuba v. Sabbattino*, 376 U.S. 398 (1964). *See, e.g., Sosa Brf.*, at 30-33. Petitioner Sosa, though, pointedly omits this Court's declaration that "it cannot be contended that the Constitution allocates this area to the exclusive jurisdiction of the executive, for the judicial power is expressly extended by that document to controversies between aliens and citizens or States." *Sabbattino*, 376 U.S. at 462. In *Sabbattino*, this Court expressly rejected the claim made by Petitioners here that judicial review was precluded because foreign policy was implicated. *Id.*

Dr. Alvarez' claims were brought under two federal statutes to remedy harms inflicted by lower level executive officials. Judicial abstention, just because these claims may touch on foreign policy concerns, would raise unprecedented issues concerning separation of powers. Never before has this Court refused to enforce federal statutes that are unquestionably constitutional just because they pertain to foreign affairs. Petitioners' arguments for dismissal have no stopping point; they would require courts to dismiss every claim authorized by federal law, no matter how egregious the injuries, if it relates in any way to foreign policy.

Similarly, Petitioners' attempt to invoke the President's power over foreign policy is misplaced. Although the President unquestionably has a unique role in representing the nation in international relations, *United States v.*

Curtiss-Wright Export Corporation, 299 U.S. 304 (1936), this case does not involve policy choices by the President. Quite the contrary, it involves decisions by low-level DEA officials acting in a manner not authorized by federal law or the President. Under the Government's analysis, the Executive's power to 'take care that the laws be faithfully executed' trickles down to *any* federal law enforcement agent, no matter what position they hold. *Pet. Brf.* at 13.

Petitioners' arguments concerning separation of powers are wrong both as a matter of constitutional law and logic. Petitioners argue that the President on occasion, such as in the war on terrorism, might need to authorize the kidnapping of a foreign national. *Sosa Br.* at 38-39; *Br. Of U.S. Supporting Petitioner*, at 31-40. They then infer from this that the courts never should allow any suit challenging foreign kidnapping done by any executive official under any circumstances. However, remedying the unlawful and unauthorized acts of low-level DEA officials under either the ATCA or FTCA does not challenge the exercise of Presidential powers to violate international law to protect this Nation's security.

This Court has expressly distinguished between the President's immunity from civil suit for actions done while carrying out the presidency and the diminished immunity of other executive branch officials. *Compare Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (absolute presidential immunity), with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (denying absolute immunity and according qualified immunity to high level executive officials). In essence, Petitioners are urging this Court to create absolute immunity to civil suits for any executive branch official acting in any area implicating foreign policy concerns. Such expansive immunity has no support from any decision of this Court and

is logically unnecessary to protect the rare case involving a presidential action in foreign policy.

As a matter of separation of powers law, Petitioners' argument is flawed because it undermines the system of checks and balances which are at the core of our constitutional system. The "[s]eparation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty." *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring). As James Madison wrote in the Federalist Papers: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 301 (C. Rossiter ed. 1961).

Petitioners would undermine the separation of powers by allowing the executive branch unreviewable power to authorize any action any federal law enforcement official deems necessary in any foreign country. Preventing the judiciary from carrying out its basic and traditional function of according remedies to injured individuals violates basic principles of separation of powers. *United States v. Nixon*, 418 U.S. 683, 707 (1974) ("The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Article III.")

This Court will not in any way disrespect the Executive and will not undermine the separation of powers by affirming the Court of Appeals' judgment in this case that Dr. Alvarez-Machain is entitled to a modest damages remedy for the violation of his rights by DEA agents who transgressed the limitations on their activities set by Congress and international law.

CONCLUSION

For all of the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Dated: February 27, 2004

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